



Analysis on the Standard of Deep Link Behavior Infringement

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Abstract. The problem of works deep link is the question which has no answer for a long time in our country. Opinions on the standard selection theory field and practice field of “providing behavior” vary widely, which involves both the technical fact and legal understanding and positioning. Therefore, on the basis of respecting the technical reality, the author classifies the deep link systemically, and lists the current mode of linking behavior by combining the characteristics of the technology and the current business model. The focus of the controversy is to discuss the “providing link behavior”, and then analyzes the mainstream standard of “providing behavior” in the theoretical circle. Finally, the empirical research method combined with the current judicial situation of our conclusion that continue to adhere to the server standard.

Keywords: Copyright infringement · Deep link · Information network communication right · Server standard

1 Introduction

Under the framework of information network communication right stipulated in the World Intellectual Property Copyright Organization Treaty (WCT) and the Copyright Law of China, there are fierce disputes in theory and judicial practice about the determination criteria for deep link infringement of network works. There are many different viewpoints, and there seems to be no coordination between theory and practice. The court’s decision is also wavering. With the rapid iteration of link technology and the continuous innovation of business model, this legal problem without a reasonable answer for a long time has become more ambiguous and complicated.

On the one hand, from the perspective of encouraging technological and business model innovation, deep link technology optimizes the search experience of network users, liberates them from massive data, fits in with the fast-paced development lifestyle of the current society, greatly promotes the wide dissemination of works, and promotes the interconnection of information in the 21st century.

On the other hand, from the perspective of protecting the interests of the right holders, network aggregation platforms do not need to pay high copyright licensing fees. For copyright owners, if the free use of their works by network aggregation platforms does not constitute infringement, according to the “bad money drives out good money”, no one

is willing to pay for the use of the works. The function of the network copyright system to stimulate scientific, cultural and artistic innovation will inevitably occur “institutional failure”.

Therefore, on the basis of scientifically clarifying the boundary of deep link technology and its behavior, the starting point and landing point of this paper will be to choose what standard to reasonably allocate the legal liability of deep link behavior while taking into account the reasonable utilization of information by network users and the protection of the dissemination interests of right holders.

2 Technical Analysis and Clarification of Deep Link

2.1 Technical Classification of Deep Link Behavior

According to technical characteristics and communication effects, deep links can be divided into indicative links and offering links. Indicative links mean that users will automatically jump to the linked website after clicking on the linked website. At this time, the linked website is equivalent to a technical service provider (ISP), which is in a position of technology neutrality. Only when the linked website has direct infringement can it bear the indirect infringement liability for failing to perform the examination obligation, and according to the law, the “safe haven principle” is specially provided as the defense. The provision of link means that users will not jump after clicking on the linked website. Typical cases include framed link, buried link and leech link. Compared with the former, the latter is different in subjective purpose, spread scope and rights and benefits, which can be said to be two completely different linking technologies. The discussion of the behavior of making available links is therefore key to this article.

2.2 The Behavior Pattern of Deep Links

Combined with the current application status of link providing technology, the behavior pattern can be divided into three categories according to whether the content of works on the linked website is authorized or not.

1. Deep links to works that have been legally and publicly available to the public by other websites, such as the bbc News website.¹
2. Deep links Other websites do not provide to the public and have access technical measures to restrict visitors from spreading the works suspected of infringement.
3. Deep links to infringing works that have been open to the public and can be freely accessed and distributed by other illegal websites.
4. Deep links to infringing works not provided to the public by other illegal websites and restricted by technical measures.
5. Rebroadcast works on others' websites in the form of deep links, that is, deep links of sublicense.

¹ Wang Qian. On the legal definition and Regulation of providing "deep link" behavior [J]. Law of China, 2016, No. 419(10): 27.

As for the above five typical behaviors commonly seen in judicial practice, firstly, since the link setter does not set any measures for the dissemination of his works, the arbitrary dissemination of his works on the Internet is exactly in line with his expectations, so the link setter does not constitute infringement.² Typical examples include bbc News website. Secondly, the author sets technical measures. The link setter's behavior of bypassing or destroying technical measures seriously damages the author's communication interests and thus constitutes direct infringement, typical of which is link leech. 5. If the link site is allowed to subauthorize its legally authorized works through deep links, it will expand the scope of control and use of the network communication of the works information, which will inevitably lead to the loss of the interests of the right holder, which is obviously unacceptable, so both constitute joint infringement. However, the legal nature of acts 3 and 4 is controversial, which is also the focus of discussion below.

3 Analysis of Standards for “Offering Behavior”

According to Chinese Copyright Law and WCT Copyright Convention, the controlled behavior of the right of information network transmission is “the act of providing works”. The criterion of this behavior is in full blossom in the theoretical circle.³ The discussion on this issue seems to have evolved from a legal problem of copyright to a difficult problem of “world view”. Moreover, this “world view problem” is also a “global” problem. Different countries and regions have different opinions, and even different courts in the same country or region have different ways to deal with it. In view of this, the author will analyze the tort standard and its advantages and disadvantages of the information network communication right in Chinese academia⁴.

3.1 Server Standards

Supporters of this standard argue that the “act of providing” regulated by the right of information network transmission is equivalent to the act of uploading to the server.⁵ This standard, derived from the Google case, has the advantage of being objective - simply uploading a work to a server constitutes an infringement, and the burden of proof is relatively easy for a defendant. In the web1.0 era characterized by “read-only”, it was once favored by scholars and judges and became the mainstream standard of judicial practice at that time. However, with the development of The Times, its many shortcomings are also evident. First, with the upgrading of bandwidth and the wider layout of cdn nodes, uploading to the server is not necessary. In addition, this standard is only a sufficient condition rather than a necessary condition stipulated in Article 8 of wct, so it is not legal to regard it as the mainstream standard.

² LIU Yinliang. On the Limitation of Server Standard [J]. *Journal of Law*,2018,39(05):59.

³ Yang Y. Legal Regulation of deep link [J]. *China Copyright*,2015,No.79(01):57(in Chinese).

⁴ Xu Minchuan. On the definition of “providing works” on the Internet [J]. *Chinese and Foreign Law*,20,32(02):382.

⁵ CUI Guobin. The server standard of the form and the mind [J]. *Intellectual Property*,2016,No.186(08):58

3.2 User Perception Standard

As a subjective standard, this standard also comes from the Google case. Supporters of this standard believe that according to Chinese law, “works in the state of public access” is the result of the “act of providing works”, and the two are closely connected and inseparable. It can be said that the former is the necessary condition of the latter, so users’ subjective perception is the standard when judging the act of providing works. This standard has also been criticized. On the one hand, it is too subjective, difficult to obtain evidence and easy to expand the discretion of judges. On the other hand, the confusing behavior of users is not the value of copyright, so subjecting factual issues is obviously unreasonable.

3.3 Material Substitution and Material Presentation Standards

These two standards are derived from user perception standards. According to the technical characteristics of deep linking, supporters of substantive replacement standards believe that users can browse works and divert traffic from linked websites without visiting linked websites, which is no different from directly providing works. However, this standard overemphasizes the benefits and losses brought by the behavior, which makes the judgment of infringement standard reduced to simple profit and loss calculation, which violates the basic logic of law. Supporters of the material presentation standard believe that the behavior of deep link infringes on the author’s “right of display”. However, it would be against the logic of the “Copyright Law” to strike accurately from the behavior effect rather than the behavior itself. Moreover, the concept of the right of display is an imported product and there are no regulations in Chinese law. The application of these two standards will improperly expand the boundary of “providing behavior”, making the chain setting behavior fall into the legal regulation easily.

4 An Empirical Study of Tort Standards

From a practical point of view, the ultimate purpose of which standard to apply is to solve the disputes and disputes caused by deep link behavior in judicial practice. Based on this, the author carries out empirical analysis and research. Based on the analysis of the cases of “China Judicial Documents Network” from 2013 to 2022, a total of 273 civil disputes related to the right of network communication of information with “deep link” as the keyword were found, among which 76 cases only involved contracts and agreements and the reasons were repeated, so there were 197 disputes about deep link.

4.1 Analysis and Presentation of Nature Data

Among the 197 cases about deep link, only 54 judges thought it constituted “act of providing works”, accounting for 27%, while 113 judges thought it was “act of providing services”, accounting for 57%. The remaining judges made no judgment on the nature of the conduct in their writing. It can be seen that the majority of judges believe that deep linking is only a technology to provide users with information location services.

4.2 Application Trend Data and Display of Infringement Standards

In these judgments, the author used the above standard as the key word to search, and 149 cases the judge mentioned the infringement standard; Among them, the server standard accounted for about 67% in 2013, and then decreased year by year, to 2020 only 11 cases applied this standard; The user perception standard has been lukewarm. There are 21 cases using this standard and most of them are audio and video infringement. Material presentation and material substitution criteria have been on the rise since they were proposed in 2015, with 63 cases involved. Legal standards were mentioned in only four cases.^{6,7}

4.3 Data Analysis and Presentation of Referee Results

After eliminating 27 directive link cases, there are 132 cases involving the relationship between the link holder, copyright owner and adjacent right holder in the remaining 170 samples, among which 34 direct infringement cases are decided, accounting for only 25%, which is closely related to the mainstream status of server standards. There are 87 indirect infringements, 25 of which apply the principle of safe haven. A total of 11 cases were ruled not to infringe.

To sum up, server standard is still the mainstream view adopted in judicial practice, and its application does not seem to affect the court to make the judgment of infringement, while other standards, such as user perception standard, mostly play a role in the burden of proof.

5 Conclusion

Excessive adherence to a certain standard will inevitably ignore the practical application of deep link in the network environment, blur the legislative purpose and judicial goal of the information network transmission right, and eventually fall into the predicament of mechanical interpretation. The author believes that server standard can still be used as the mainstream standard for judging the infringement of deep link behavior, whether according to theory or judicial practice. The application of this standard has not weakened the intensity of the protection of copyright owners' interests. Despite repeated criticism over the past 20 years since the Google case, it still stands, which is enough to show that its toughness can adapt to the development of technology and should be adhered to and followed. Of course, taking other criteria such as user perception criteria as the judgment of "offering behavior" can be an appropriate method for dispute resolution. In addition, the intellectual property system as a multi-interest balance mechanism, today's disseminator may be the user tomorrow, and vice versa, to deal with the right protection and public interests of the dialectical relationship is also worth thinking about the judicial issues.

⁶ Cui Guobin. *Politics and Law*, 2014, No. 228(05): 88. (in Chinese).

⁷ Wang Qian. On the Definition of "Network Communication Behavior" and its infringement Determination [J]. *Law*, 2006, (05): 65.

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